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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 673

H. B. NELSON CONSTRUCTION COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 22–24) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 3, 1940 (R. 24). A motion for a new trial (R. 24) was overruled on October 7, 1940 (R. 25). The petition for a writ of certiorari was filed January 4, 1941. The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended

by the Act of May 22, 1939, c. 140, 53 Stat. 752 (U. S. C., Supp. V, Title 28, Section 288).

QUESTIONS PRESENTED

1. Whether the facts as found by the Court of Claims are supported by substantial evidence.

2. Whether the Court of Claims erred in failing to find the facts as requested by petitioner.

3. Whether a release signed by petitioner bars recovery on any claim not expressly excepted from the release.

4. Whether liquidated damages were properly assessed against petitioner.[1]

STATEMENT

On September 12, 1934, petitioner entered into a contract with the United States whereby, for a consideration of $275,889.00, he agreed to furnish all the labor and materials and perform all the work required for the construction of certain buildings and plants [2] at the Naval Radio Station, Summit, Canal Zone, in accordance with certain drawings and specifications (R. 11–12). The work was

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[1] In this case, as in No. 672, filed by the same petitioner, the specifications of error to be urged (Pet. 10–19) are voluminous and confusing. See footnote 2, p. 8, Brief in Opposition in No. 672.

[2] Petitioner was to construct an intermediate and high frequency transmitter building, a low frequency transmitter building, a barracks, a helix house, a pump house, a water tower, two cooling ponds, a settling tank, certain roads and walks, and water, sewerage, drainage, and electrical systems (R. 11–12).

to be commenced within 10 calendar days after receipt of notice to proceed; the buildings and services were to be completed within 300 calendar days and the remainder of the work within 330 calendar days from the date of receipt of such notice (R. 12). Notice to proceed was received on September 26, 1934, thus fixing the completion date for the buildings and services as July 23, 1935, and of the remaining work as August 22, 1935 (R. 12). During the course of the construction certain changes were made as provided for in the contract. Change orders were issued; the contract price was increased; and the time for completion was extended (R. 17, 18), petitioner being a member of a Board appointed to consider the changes, the additional compensation, and the time extensions (R. 22, 29–30, 35). The contract was finally completed on December 2, 1935 (R. 18), and liquidated damages for delay in the amount of $2,490.00 were deducted from the final payment to petitioner (R. 19) in accordance with the terms of the contract (R. 12). Upon the completion and acceptance of the work and payment therefor by the Government, petitioner, on December 12, 1935, executed a release relieving the Government "from all claims arising under or by virtue of said contract", but reserved the right to protest the accessment of liquidated damages (R. 18–19).[3]

[3] On or about September 29, 1936, petitioner was allowed and paid through a settlement stated by the General Ac-

Petitioner, on June 8, 1937, brought this action in the Court of Claims to recover from the Government the difference between the sum the Government had paid pursuant to the contract and the alleged total cost to petitioner, plus 10% profit and 1½% for a bond (R. 10). The petition (R. 6–11),[4] after asserting various delays by the Government in inspecting materials and certain allegedly unreasonable demands by the Government, alleged that as a result of those delays and demands petitioner was unable to complete the work within the specified time, that the work cost $83,657.90 in addition to the contract price (R. 9), and that the deduction of liquidated damages for delay was illegal.

The Court of Claims made findings of fact (R. 11–21) and conclusions of law (R. 22) and rendered an opinion (R. 22–24). The court found that there was no delay on the part of the Government in the inspection of any of the materials and that none of the changes and requirements by the Government was unreasonable or abritrary. It accordingly held (R. 22) that petitioner was not entitled to recover and that the complaint should be dismissed. In its opinion the court pointed out

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counting Office the sum of $720.00, purporting to adjust the deduction for liquidated damages (R. 19).

[4] The complete petition (R. 1–11) alleged two separate causes of action. Only the second cause of action (R. 6–11) is here involved, the first (R. 1–6) being the subject matter of a separate suit, No. 672, this Term.

that "all these changes which were made were provided for in the contract, and that plaintiff accepted the Change Orders, performed the work, received the compensation as fixed in the Change Orders and that the time for completion of the contract was extended by the allowance of additional days. In addition to this, plaintiff's release to defendant of all claims is a complete defense to any action for recovery under the contract except as to the items which had been specifically excepted in the release" (R. 23).[5] Judgment was entered dismissing the complaint (R. 24). A motion for a new trial (R. 24) was overruled (R. 25).

ARGUMENT

Petitioner contends that the Court of Claims erred in failing to find that there were so many changes and delays caused by the Government, in addition to those in the Change Orders, as to amount to an abandonment of the contract by the Government, thereby entitling respondent to a *quantum meruit* recovery (Pet. 27–33, 33–34, 35), that the release was not binding (Pet. 35–37) and that liquidated damages for delay were illegally deducted by the Government (Pet. 38–40). The court below found against petitioner on each issue, and the case presents no question which would warrant review by this Court.

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[5] The court also held, in accordance with its findings, that the specific delays for which liquidated damages were assessed were not caused by respondent (R. 24).

1. (a) The record in no way suggests an abandonment of the original contract by the Government. On the contrary, it is clear, as the court below held, that all actions of the parties were in strict compliance with the terms of the contract (R. 23). Change Orders (R. 17–18), as provided for in the contract, were issued. Petitioner was a member of the Board which issued the Change Orders (R. 22, 29–30, 35) and signed the reports agreeing to the changes as to contract price and completion date (*ibid.*). Moreover, on receipt of payment in full, petitioner, pursuant to the contract, signed the release mentioned above (R. 18–19, 30). At no time during any of the negotiations did petitioner suggest that the contract was or should be changed to a cost-plus contract. There is nothing in the decisions of this Court which support the suggestion that a "multitude" of changes in accordance with the procedure established by contract entitles the contractor to sue on a quantum meruit basis. *United States* v. *Spearin,* 248 U. S. 132, relied on by petitioner, is not in point. There the Government illegally annulled a contract, and the Court allowed as damages the difference between expenditures and receipts, plus the certain profit which would have been earned if there had been no annulment. See also *United States* v. *Behan,* 110 U. S. 338. In *United States* v. *Barlow,* 184 U. S. 123, the extra work was concededly experimental, and the Gov-

ernment officers, while acknowledging that some compensation should be given, concluded that the work was not within the coverage of the change order provision.

(b) Moreover, there is no substantial evidence to support petitioner's contention that there were so many changes, in addition to those in the Change Orders, as to amount to an abandonment of the original contract. The only evidence on this point is petitioner's statement that there were many changes (R. 28–29). The Court of Claims did not have to give weight to that testimony. Cf. *United States* v. *Goltra,* Nos. 191, 192, this Term, decided February 3, 1941. On the other hand, the Court of Claims found that the Government caused no delay and did not require petitioner to do more than his contract required. These findings are all supported by substantial evidence.[6]

[6] Road roller (Fdg. 8, R. 16): The evidence showed that a smaller roller than that set forth in the specifications was used, that other roads had been built under the same specifications, and that the roller was not too heavy (R. 39–40).

Windows and Screens (Fdg. 3, R. 12–13): The specifications provided that the screens should fit the windows for which they are used (R. 37). The evidence shows that after their arrival, the screens did not fit, and that all the Government required was that they be made to fit (R. 36–38).

Ceiling (Fdg. 7, R. 15–16): The evidence shows that the copper ceiling was put in by bolts, that petitioner had unsuccessfully tried the more expensive "sweating" process, that although bolts were finally used, petitioner was paid on the basis of the "sweating" process (R. 32–35). More-

2. Petitioner's contention that liquidated damages for delay were illegally deducted is without substance. The court below, as we have shown *supra,* properly found that the Government did not cause any delays. The contracting officer found that the delays by petitioner were not excusable and his determination was incorporated in the court's findings (R. 19–21). There being no showing that the action of the contracting officer was arbitrary or capricious, his determination is conclusive. See Brief in Opposition in No. 672, this Term.

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over, it appeared that the "sweating" process was successfully used elsewhere (R. 35).

Lavatories (Fdg. 5, R. 14–15): The evidence shows there was no delay in inspection (R. 20–21). Moreover, it appears that the time of receipt of the lavatories on the job in no way affected the completion date of the buildings in which they were installed (R. 32).

Putty and Glass (Fdg. 4, R. 13–14): The evidence shows that the Government inspector requested the manufacturer to submit a detailed list of glass and putty, which was done on September 19, 1935, that the glass was inspected and released on September 23, 1935, that a sample of the putty was taken for analysis on September 23, 1935, and released for shipment on October 2, 1935, and that this was a reasonably short time (R. 31–32).

Pumps (Fdg. 9, R. 16–17): The evidence shows that petitioner applied for pump tests on October 21, 1935, and that they were tested on November 1, 1935 (R. 28). There is no evidence of damages to petitioner, or any proof that a pump man would not have been required even if the pumps had been tested.

Plumbing supplies: The record discloses that the receipt of the plumbing supplies in no way affected the completion date of the buildings (R. 32).

3. Petitioner's contention that the release was not binding since it was signed when petitioner needed money to meet his pay roll is clearly without merit. Assuming that the Government insisted on the release as a condition of payment in accordance with the right expressly reserved in the contract, such exercise of a contract right does not constitute duress. Williston on Contracts (Rev. ed. 1937), Sec. 1606. See Brief in Opposition in No. 672, this Term. Petitioner's contention that the release should not be construed to include claims for damages is in the teeth of the express language of the contract. Even if the claim for a quantum meruit recovery is not one "under the contract," it is certainly one arising "by virtue of the contract." *Piatt's Administrator* v. *United States,* 89 U. S. 496, is not in point. There it was merely held that a private Act directed the accounting officers of the Government to "settle" with a contractor, the settlement not to exceed the amount claimed by the Government on a counterclaim, did not contemplate a payment in full, and did not prevent recovery of any further balance due. See also *Fire Insurance Association* v. *Wickham,* 141 U. S. 564. Here, the release provision (R. 18) is clear, specifically barring all claims, save such items as are specifically excepted.

CONCLUSION

There is no conflict of decisions, and no question of importance is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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